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In the Supreme Court of the United States

OCTOBER TERM, 1980

FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, AND A. J. TAYLOR, SECRETARY OF THE FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, PETITIONERS

v.

FLORIDA NURSING HOME ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

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QUESTION PRESENTED

Whether Florida, in its contractual agreement with respondent nursing homes, waived its sovereign immunity from suit in federal court for money damages.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Discussion	6
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Alabama Nursing Home Ass'n v. *Califano*, 433 F. Supp. 1325	4
Edelman v. *Jordan*, 415 U.S. 651	5, 8
Golden Isles Convalescent Center, Inc. v. *Califano*, 442 F. Supp. 201	4
Harris v. *McRae*, No. 79-1268 (June 30, 1980)	8
Murray v. *Wilson Distilling Co.*, 213 U.S. 151	9

Constitution, statutes and regulation:

United States Constitution, Eleventh Amendment	5, 8, 10, 11
Departments of Labor and Health, Education, and Welfare Appropriation Act 1977, Title II, Pub. L. No. 94-439, 90 Stat. 1429	7
Pub. L. No. 94-182, Section III, 89 Stat. 1054	10
Pub. L. No. 94-552, 90 Stat. 2540	10
Pub. L. No. 95-130, 91 Stat. 1153	8
42 U.S.C. 1396a(a)(13)(E)	1, 2
45 C.F.R. 250.30(a)(3)(iv) (1976)	3

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Page

Miscellaneous:

41 Fed. Reg. (1976):

p. 15560 3
p. 27300 ..... 2, 3
p. 27305 3

H.R. Conf. Rep. No. 92-1605, 92d Cong., 2d Sess. (1972) 2

H.R. Rep. No. 94-1122, 94th Cong., 2d Sess. (1976) 11

S. Rep. No. 92-1230, 92d Cong., 2d Sess. (1972) 1

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1–28) is reported at 616 F.2d 1355. The opinion of the district court (Pet. App. 31–33) is not reported. A related opinion of the district court (Pet. App. 34–40) is reported at 442 F. Supp. 201.

JURISDICTION

The judgment of the court of appeals was entered on May 6, 1980. A petition for rehearing was denied on July 22, 1980 (Pet. App. 29–30). This Court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

STATEMENT

1. In 1972 Congress amended the Medicaid Act to require that state medical assistance plans under the statute provide for payment "on a reasonable cost related basis" for services rendered by a skilled nursing facility or an intermediate care facility, as those terms are used in the Act. 42 U.S.C. 1396a(a) (13) (E). Previously, states participating in the Medicaid program were permitted to reimburse provider facilities for such services on either a "flat rate" basis or a cost-related basis, as prescribed by the relevant state authority, and there was no federal statutory standard to ensure that the amounts actually paid were reasonably related to the reasonable costs of the services rendered. See S. Rep. No. 92–1230, 92d Cong., 2d Sess. 287–288 (1972).[1]

[1] As the Secretary of Health, Education, and Welfare explained when he issued regulations implementing the 1972 amendment,

> the [Senate] Committee was concerned about the effect of both underpayment and overpayment on the quality of medical care of recipients. If facilities are underpaid, be-

Under the 1972 amendment, the new Medicaid reimbursement standard for skilled nursing facilities and intermediate care facilities was to become effective on July 1, 1976. This effective date appears in 42 U.S.C. 1396a(a) (13) (E) and was the product of a conference committee compromise that postponed the effectiveness of the new provision until two years after the date initially proposed by the Senate. H.R. Conf. Rep. No. 92-1605, 92d Cong., 2d Sess. 56-57 (1972). Although Congress thus provided nearly four years' lead time before the cost-related reimbursement requirement was to become operative, the Secretary of Health, Education, and Welfare did not promulgate proposed implementing regulations until April 13,

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cause a State's flat rate is unrealistically low or because in determining its rate the State refuses to recognize as allowable costs some of the real costs of providing the services, facilities will be under pressure to cut corners and provide lower quality care, or will be forced to make their non-Medicaid patients absorb some of the cost of Medicaid patients' care; at worst, facilities may refuse to accept Medicaid patients. If facilities are overpaid, either because the State's flat rate is unrealistically high or because the State payment formula permits reimbursement for unnecessary items such as luxury services, questionable depreciation allowances and the like, there is little incentive for providers to employ the most efficient and economical methods of providing services, with the result that the State's Medicaid dollars do not go as far as they could to provide needed medical care. When increased inflation and unemployment are already straining State welfare budgets, this is a serious consideration. The rising costs of the Medicaid program may force a State to drop optional services or the medically needed category from its plan, as some States have already done; at worst, the high prices of medical care and services in skilled nursing facilities and intermediate care facilities might be a factor in the State's decision to drop out of the Medicaid program altogether.

41 Fed. Reg. 27300 (1976).

1976, only 11 weeks before the statutory effective date. See 41 Fed. Reg. 15560.

After receiving and considering comments from several hundred interested parties, including 20 states, the Secretary published his final regulations on July 1, 1976, the day the congressionally prescribed reimbursement method became mandatory. 41 Fed. Reg. 27300. At that time, the Secretary responded to state complaints about the tardiness of his regulations by announcing that no administrative enforcement measures would be undertaken against states that reimbursed skilled nursing facilities and intermediate care facilities according to reasonable cost-related payment rates effective no later than January 1, 1978. The relevant regulation states:

> The State [Medicaid] plan shall set forth the methods and standards used by the State to determine reasonable cost-related payment rates, and shall set payment rates on the basis of such methods and standards, to be effective no later than January 1, 1978.

45 C.F.R. 250.30(a) (3) (iv) (1976). In his commentary accompanying the final regulations, the Secretary explained (41 Fed. Reg. 27305 (1976)):

> A considerable number of States have expressed concern regarding the timetable for implementation of these regulations. The Department is aware that, although a good number of States will be able to implement the greater part of these regulations fairly quickly, some will need a good deal of time to begin to accumulate the cost data on which to base payment rates, and none will be able to meet all the requirements as of July 1, 1976. The Department does not intend that States should be penalized for the Department's delay in publishing final regulations. Therefore,

the regulations require that the initial cost-reporting period begin no later than January 1, 1977, and that States set reasonable cost-related rates no later than January 1, 1978, on the basis of cost data submitted by providers. The States are encouraged to meet each requirement of the regulations as soon as possible.

2. On March 8, 1977, the respondent nursing home association and individual nursing homes filed this action in the United States District Court for the Southern District of Florida against petitioners and the Secretary of Health, Education, and Welfare. Respondents contended that the Secretary's regulation concerning the timetable for implementation of the cost-related reimbursement requirement was inconsistent with the statutory directive that that requirement take effect on July 1, 1976. They sought declaratory and injunctive relief and, in addition, retroactive payments, on a "reasonable cost-related basis," for the period beginning July 1, 1976.

When the complaint in the present case was filed, a similar suit, brought by the same nursing homes in October 1976, was already pending in the district court. In October 1977, the district court ruled in this other case that the Secretary's regulation was inconsistent with the 1972 statutory amendment and was therefore invalid "insofar as it sets an effective date other than July 1, 1976." Pet. App. 37, reprinting *Golden Isles Convalescent Center, Inc.* v. *Califano*, 442 F. Supp. 201 (1977).[2] The court reserved the question whether plaintiffs in *Golden Isles* were entitled to recover reimbursement on a reasonable cost-related basis during the period between July 1976 and October 1977.

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[2] The district court adopted the reasoning in *Alabama Nursing Home Ass'n* v. *Califano*, 433 F. Supp. 1325 (M.D. Ala. 1977), another case involving a challenge to the Secretary's regulation on statutory grounds.

Subsequently, the district court granted partial summary judgment in the present case on the basis of its earlier decision in *Golden Isles*.[3] The court ordered that respondent nursing homes should receive reimbursement on a reasonable cost-related basis beginning on October 18, 1977, the date of the partial summary judgment order in *Golden Isles*. The court again reserved the question whether the nursing homes were entitled to retroactive reimbursement on a reasonable cost-related basis for the period from July 1976 to October 1977.

In July 1978, the district court consolidated *Golden Isles* and the present case "insofar as the issues as to 'reasonable cost related basis' are concerned" (Pet. App. 32). The court then ruled that the plaintiff nursing homes in the two cases could not recover retroactive payments on a reasonable cost-related basis for the period before October 18, 1977, because "such claims are barred by the 11th Amendment" (Pet. App. 32–33). In support of this decision, the district court relied on *Edelman* v. *Jordan*, 415 U.S. 651 (1974).

The court of appeals reversed (Pet. App. 21–28). The court ruled that "Florida has waived its Eleventh Amendment immunity by consenting to be sued in federal court under the terms of its contracts" with respondent nursing homes (*id.* at 22). The court acknowledged (*id.* at 24) that, under *Edelman* v. *Jordan*, *supra*, the Eleventh Amendment bars retroactive monetary claims in federal court against a state or its agencies, in the absence of specific consent to be subject to such suits. The court of appeals found such consent, however, in the following paragraph of Florida's standard agreement with Medicaid providers:

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[3] This order is not reproduced in the petition, but it was apparently entered in January 1978.

> Both the provider and the Single State Agency hereby agree to recognize and abide by all State and Federal Laws, Regulations, and Guidelines applicable to participation in and administration of, the Title XIX Medicaid Program.

The court explained (Pet. App. 26–27):

> By contracting with appellants to be bound by all federal laws applicable to the Medicaid program, the state has expressly waived its Eleventh Amendment immunity and consented to suit in federal court regarding any action by providers alleging a breach of these laws.

The court further stated (*id.* at 27–28) that a contrary holding in this case "would achieve an inequitable result."[4]

DISCUSSION

1. The federal government has little or no direct interest in the outcome of the present litigation. Because the district court granted partial summary judgment on October 18, 1977, and the Department of Health, Education, and Welfare was, in any event, scheduled to begin full enforcement of the reasonable cost-related reimbursement requirement on January 1, 1978, the Secretary did not appeal the district court's ruling, and, consequently, the validity of the Secretary's regulation was not at issue before the Fifth Cir-

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[4] The court of appeals also rejected petitioners' appeal from the partial summary judgment granted to respondent nursing homes with respect to Florida's obligation under the Medicaid Act immediately to begin reimbursement on a reasonable cost-related basis. See Pet. App. 7–21. Petitioners sought further review of this aspect of the court of appeals' decision, and their petition for a writ of certiorari (No. 80–85) was denied on October 6, 1980.

cuit.[5] Moreover, even if petitioners are required to make retroactive payments on a reasonable cost-related basis from the period from July 1976 to October 1977, the federal government will not be obligated to contribute to such payments. Under the HEW Appropriations Act for fiscal year 1977, federal contribution toward the Medicaid expenses of participating states is available only with respect to those expenses covered by an approved state Medicaid plan submitted no later than the quarter for which federal reimbursement is sought.[6]

In the present case, Florida did not submit a plan providing for reimbursement of respondent nursing homes on a reasonable cost-related basis until the State was ordered to do so by the district court in October 1977. Accordingly, for the five quarters beginning July 1, 1976 and ending September 30, 1977, the Florida Medicaid plan did not include any such feature, and, under the relevant federal appropriations

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[5] Petitioners' appeal from the partial summary judgment entered by the district court primarily concerned jurisdictional matters and the propriety of injunctive relief against the State. Petitioners did not argue in the court of appeals that the Secretary, by regulation, could properly postpone an effective date prescribed by Congress.

[6] The relevant statutory provision is found in Title II of the Departments of Labor and Health, Education, and Welfare Appropriation Act, 1977, Pub. L. No. 94-439, 90 Stat. 1429. It provides that, in the administration of several cooperative federal-state programs under the Social Security Act, including the Medicaid program,

> payments to a State * * * for any quarter in the period beginning July 1, 1976, and ending September 30, 1977, may be made with respect to a State plan approved * * * prior to or during such period, but no such payment shall be made with respect to any plan for any quarter prior to the quarter in which a subsequently approved plan was submitted.

legislation, no federal funds are available to pay for items not specified in the state plan.[7] If the court of appeals' decision is permitted to stand, Florida alone will bear the burden of paying respondent nursing homes the difference between the flat rate previously in effect for services rendered between July 1, 1976 and September 30, 1977, and the "reasonable cost-related" rate that the court of appeals has ordered to be applied retroactively to that period.[8]

2. We believe, however, that the court of appeals' ruling is clearly incorrect. The court's finding that the contract language reproduced above (see page 6, *supra*) waived Florida's sovereign immunity under the Eleventh Amendment is contrary to the ordinary meaning of the words employed and is inconsistent with this Court's injunction in *Edelman* v. *Jordan*, *supra*, 415 U.S. at 673, that such waivers be found "only where stated 'by the most express language or

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[7] In response to the district court's order of October 18, 1977, Florida submitted to the Secretary on December 12, 1977, a proposed plan incorporating the reasonable cost-related reimbursement requirement. The Secretary approved the plan on April 26, 1978. HEW appropriations for the month of October 1977 were provided by a joint resolution that simply continued in effect the provisions of the appropriations act for the previous fiscal year. See Pub. L. No. 95-130, 91 Stat. 1153. Accordingly, since the Florida plan that was subsequently approved was submitted before the end of the first quarter of fiscal year 1978, federal contribution would presumably be available for whatever retroactive payments Florida may be required to make for the period from October 1, 1977 to October 18, 1977. This is the extent of the federal financial interest in the current litigation.

[8] Florida will not be absolved of this obligation by the unavailability of federal contribution. In that sense, the present case is unlike *Harris* v. *McRae*, No. 79-1268 (June 30, 1980).

Here, Congress has specifically directed that skilled nursing facilities be paid on a reasonable cost-related basis for services rendered under the Medicaid program. Congress made this requirement effective on July 1, 1976, and appropriated funds for

by such overwhelming implications from the text as [will] leave no room for any other reasonable construction'" (quoting from *Murray* v. *Wilson Distilling Co.*, 213 U.S. 151, 171 (1909)). Moreover, the court of appeals' decision completely ignores the plain restrictions on the way in which waivers of sovereign immunity may be accomplished under Florida law and the presumption against such waivers arising from recent congressional action on the subject.

The contractual provision on which the court of appeals relied states only that the State and the Medicaid provider agree to "recognize and abide by" federal

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Medicaid purposes. Those funds would have been available for federal contribution to state nursing home payments calculated on a reasonable cost-related basis, if only Florida had provided for such payments in its Medicaid plan. Although the Secretary, in his final regulations promulgated on July 1, 1976, deferred administrative enforcement of the reasonable cost-related reimbursement rquirement until January 1, 1978, he encouraged participating states to comply with that requirement as quickly as possible (see page 4, *supra*). He did not and could not modify the terms of Congress' appropriations legislation to permit retroactive federal contribution in situations like the one presented in this case.

By contrast, in *McRae*, Congress simply decided that, regardless of the provisions of state Medicaid programs, no federal contribution would be available for most abortions. Under these circumstances, where Congress has decided not to provide any funding at all for particular services, the federal government argued, and the Court agreed (slip op. 8–11), that Congress could not have intended to require states to bear the full cost of such services as a condition of participating in the Medicaid program. The situation considered in *McRae* is quite different from the one now before the Court, in which Congress explicitly directed that certain Medicaid payments be made on a specified basis but also enacted an appropriations measure of general applicability conditioning the availability of federal contribution for any particular Medicaid expenditures on the inclusion of an appropriate provision governing those expenditures in state Medicaid plans.

laws and regulations governing the Medicaid program. These words cannot reasonably be thought to imply a waiver of sovereign immunity from damages actions in federal court, much less to imply such a waiver under the strict standard of *Edelman*.

The court of appeals' decision becomes even more dubious when viewed in light of the Florida constitutional provision that permits consent to suit against the State to be given only by statute. See Pet. 6, 17-20. No such statutory consent was given in this case.[9] Although the provisions of state law may not, by themselves, be dispositive of the question whether a state participating in a federally-created cooperative program has waived its sovereign immunity with respect to that participation, the state law requirements for an effective waiver are surely entitled to substantial evidentiary weight on the matter.

In addition, Congress at one time required a waiver of sovereign immunity with respect to certain claims as a condition of a state's participation in the Medicaid program. See Section 111 of Pub. L. No. 94-182, 89 Stat. 1054, requiring state Medicaid plans to include a waiver of any Eleventh Amendment immunity from suits brought by providers of in-patient hospital services. This provision was repealed in October 1976, less than one year after it became effective (see Pub. L. No. 94-552, 90 Stat. 2540), and the repeal was made retroactive to January 1, 1976, the original date of the waiver requirement.

The House committee report accompanying the repealing legislation explained that the waiver require-

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[9] A Florida statute does permit the petitioner Department of Health and Rehabilitative Services to be sued in state court (see Pet. 6, 16), and respondent nursing homes have also filed a suit in the appropriate Florida circuit court seeking retroactive reimbursement on a reasonable cost-related basis for the period

ment had created widespread apprehension among states participating in the Medicaid program that they would be subject to "an unreasonable burden of suits which will be costly in terms of time and legal manpower, and which will make effective program administration virtually impossible." H.R. Rep. No. 94-1122, 94th Cong., 2d Sess. 4 (1976). Such consequences would be no less likely to arise from a waiver of Eleventh Amendment immunity in the present context, and it is therefore highly improbable that Florida would have voluntarily waived its immunity from suit by providers of Medicaid nursing services.

3. Although we believe the court of appeals' decision is unsupportable, it involves only the construction of one state contractual provision under the Medicaid program. The time period concerned is only 15 months, and the amount of money at stake is only the difference between one Medicaid payment rate and another. The court of appeals purported to follow the fundamental principles established in *Edelman* v. *Jordan*, *supra*, and merely found a waiver of sovereign immunity based on particular contract language in a particular statutory and regulatory context. Under these circumstances, plenary review by this Court may not be warranted.

On the other hand, if the court of appeals' decision is permitted to stand, it may encourage other unjustified findings of Eleventh Amendment waivers by federal courts in the Fifth Circuit and elsewhere. The temptation to reach such an erroneous result is likely to be particularly strong when a court concludes, as the court of appeals did in this case, that it must find a waiver of sovereign immunity in order to avoid "an inequitable result" (Pet. App. 28). And, of course, if the

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from July 1, 1976 to October 18, 1977 (see Pet. 26 & n. 15). That proceeding is apparently being held in abeyance pending the outcome of the federal litigation.

decision below remains undisturbed, Florida will be required to pay sums for which it did not consent to be liable, and there may well be further litigation between the State and the federal government regarding the State's right to federal contribution for the additional Medicaid payments that will have to be made to respondent nursing homes.

Accordingly, the Court may wish to consider summary reversal in this case. The respondent nursing homes and nursing home association, in their briefs in opposition, have not offered any additional support for the court of appeals' ruling, and this Court's consideration of the disputed one-sentence contractual provision is not likely to be appreciably aided by further briefing and argument. Moreover, if the court of appeals' ruling is promptly reversed, it will avoid the potential necessity for states participating in the Medicaid program to amend their contractual agreements with providers to make plain that general commitments to abide by federal law and regulations do not imply consent to suits for retroactive monetary relief in federal court.

CONCLUSION

The petition for a writ of certiorari should be granted, and the Court may wish to consider summary reversal.

Respectfully submitted.

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